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IN THE

Supreme Court of the United States

OCTOBER TERM, 1963

No. 13

RETAIL CLERKS INTERNATIONAL ASSOCIATION, LOCAL 1625, AFL-CIO, *et al.*, *Petitioners*,

v.

ALBERTA SCHERMERHORN, *et al.*, *Respondents*.

On Writ of Certiorari to the Supreme Court of Florida

REPLY BRIEF FOR PETITIONERS

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PETITIONERS' REPLY BRIEF

I. Since the Government Agrees that the States Have No Power to Regulate "Any Conduct" Which Might Violate State "Right-to-Work" Laws, the Issue Remaining is the Extent to Which State Remedial Power Has Been Preempted Over the Execution and Application of Contracts.

Although respondents have not filed a brief, the views of the Government and others have been expressed in briefs *amici curiae*.[1]

It appears that the Government is in accord with us on at least two major issues: 1) The States have "no jurisdiction over peaceful strikes and picketing under any cir-

[1] The amicus brief for some 18 "right-to-work" States makes no arguments which are not discussed in the Solicitor General's brief.

cumstances" (Govt. Br. 6, 37-38);[2] and 2) Concurrent exercise of remedial jurisdiction by both the National Labor Relations Board and the State courts "would inevitably give rise to the possibility of diverse or conflicting adjudications on the same facts," and "wise policy requires avoiding the possibilities of conflict" (Govt. Br. 56).

Although the Government's brief at least seven times says (as quoted above) that the States have been preempted of power to regulate strikes and picketing under any circumstances, the Government observes that there is a "second, but less satisfactory, solution" which would permit State court jurisdiction over such activities where they are "*unequivocally aimed* at an *immediate violation* of State laws" (Govt. Br. 40). Such a solution would, however, "create the very kind of danger that the *Garner* rule was intended to avoid," the Government correctly concludes (Govt. Br. 41). Since it is admittedly unsatisfactory and

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[2] The Government's views on this proposition are stated in a variety of ways throughout its brief:

(i) ". . . it is arguable that the States have no jurisdiction over peaceful strikes and picketing under any circumstances . . ." (Govt. Br. 6).

(ii) "This State jurisdiction . . . does not extend to any conduct that is found to tend towards violation, for that would plainly interfere with exclusive federal jurisdiction over other aspects of labor-management relations" (Govt. Br. 12).

(iii) "It seems plain . . . that the States' power does not extend to enjoining any conduct which the State finds has a tendency or purpose to bring about the execution of a union-security contract" (Govt. Br. 33).

(iv) "To allow State tribunals to take evidence upon the purposes of picketing in a controversy over union recognition or organization and then to issue injunctions whenever convinced that the union's ultimate objective was a closed or union shop agreement, would seriously interfere with the national labor policy in areas over which Congress left no jurisdiction in the States" (Govt. Br. 34).

contrary to the *Garner* rule, there appears to be no reason to give serious attention to this second "solution."

Because the Government shares our view that at the very least the States have "no jurisdiction over peaceful strikes and picketing under any circumstances" (Govt. Br. 6), and respondents have filed no brief, this reply may be limited to the issue of whether the States have power under § 14(b) to prevent and punish the *actual execution* and *application* of union security contracts in violation of "right-to-work" laws. The Government's position is that the States have unlimited remedial power (Govt. Br. 37-38), while we believe that exercise of such power by the States would interfere with the N.L.R.B.'s administration of the Labor Act and produce harsh and unintended anomalies.

Our disagreement with the Government stems from three main sources:

[continued.]

(v) ". . . if the States were permitted to enforce their right-to-work laws against strikes and picketing, there would be grave risk that many courts might find a forbidden union-security objective where the Board would find none imminent, and thus might punish or restrain conduct which the federal Act protects or at least leaves to the free play of economic forces. In order, therefore, to preserve the delicate balance between the interests of labor and management which the Act has drawn, Section 14(b) must be construed in such a way as to give the Board exclusive responsibility in this peculiarly sensitive area" (Govt. Br. 36).

(vi) "Plainly, there is no State power to deal with conflicts over union organization and collective bargaining merely because there is a claim and possibly some evidence that the union's ultimate objective is to secure the employment of union labor" (Govt. Br. 37).

(vii) "It might plausibly be argued that the States have no jurisdiction over peaceful strikes and picketing under any circumstances, but are limited to barring, punishing and redressing the actual execution of union-security contracts and discharges thereunder" (Govt. Br. 37-38).

1. The Government almost ignores the basic question raised by the Court in its order directing reargument: Does execution of a union security agreement in a "right-to-work" State violate §§ 8(a)(3) and 8(b)(2) of the federal Act? One must read the Government's brief to the end to find the Government's negative answer, yet the Government concedes that the words of the Act "will bear" the construction that § 14(b) operates as an added proviso to § 8(a)(3). We think the words of the Act will bear no other construction. Once this question is decided affirmatively, the only issue remaining is whether State jurisdiction must yield to the exercise of federal power by the N.L.R.B.

2. The legislative history on which the Government places its main emphasis is inapposite, whereas the Government ignores the history unfavorable to it.

3. The sharp and essentially arbitrary line which the Government would draw (*i.e.*, acknowledging State power to prevent and punish the "actual execution" of a union security agreement and discharges thereunder, but no power to deal with "any conduct" such as strikes or picketing) is utterly unrealistic. It can only result in misuse and confusion in the State courts which will not understand or respect such an artificial division of jurisdiction. The Government, conceding that its solution would involve *some* interference with federal regulation, asserts that the interference would not be *too great* or *undue*. Its position falls short of protecting the exclusivity of federal substantive law and procedures. The Government evidently disapproves or underestimates the holdings of this Court's preemption decisions in this area. We urge that the line separating federal and State power on this subject must be drawn more boldly and perceptibly to assure the integrity of federal law, while simultaneously achieving the Congressional object of authorizing the States to prohibit com-

pulsory membership contracts within the confines of the national labor policy.

II. The Government's Contention that Violation of a Right-to-Work Law is Not an Unfair Labor Practice Ignores the Words of the Act, Misreads the Precedents, and Misappraises the Relevant Legislative History.

Much of the Government's brief is devoted to discussing the wrong question, *i.e.*, whether Congress intended to deny the States power to enforce their "right-to-work" statutes.

The question asked by the Court, however, is *whether violation of a "right-to-work" statute constitutes a federal unfair practice.* Not until this question is answered is it useful to inquire whether the federal remedial power displaces State power; even then, the question is what did Congress intend when federal remedial power clashes with State power? The Government ignores the Court's question entirely until the end of its brief (Govt. Br. 47).

When it finally reaches the issue, the Government grudgingly admits that the language of the Act "will bear the construction" that execution or application of a union security contract in a "right-to-work" State is an unfair labor practice under §§ 8(a)(3) and 8(b)(2) (Govt. Br. 48). Notwithstanding this concession, and notwithstanding the fact that the Court in the instant case has suggested the logic of such construction (373 U.S. at 756), and that the N.L.R.B. has relied on such construction (*Giant Food Shopping Center, Inc.*, 77 N.L.R.B. 791), the Government's brief rejects it in large part on the ground that it is contrary to the "spontaneous understanding" of § 14(b) (Govt. Br. 47). The Government cites no authority which explains the

weight to be accorded a "spontaneous understanding."[3]

In addition to its "spontaneous understanding" the Government asserts that there are three "cogent" considerations for believing that execution of a union security agreement in a "right-to-work" State does not violate federal law: 1) It is "inherently unlikely" that Congress would have made the federal Board an instrument of State law; 2) The legislative history does not show that Congress intended to create this unfair labor practice; and 3) There is "compelling evidence" that Congress intended to permit the States to enforce their own laws (Govt. Br. 52-56). Individually and combined, these reasons are without substance.

The Government thinks it "inherently unlikely that Congress would have wished to make the federal agency an instrument of state policy" (Govt. Br. 52). This statement fundamentally misconceives the nature of § 14(b) and, in a larger sense, the flexibility of our federal system. The Congress which enacted § 14(b) made law for the whole United States. The statute embodies the "national labor policy," and here it was the judgment of Congress that this national policy would be promoted by the law of the individual States.[4] Such provisions are far from unique. See, e.g., the

[3] We are aware of no case in this or any other Court interpreting legislation on this basis or even explaining the meaning of that phrase. There is, however, a doctrine giving effect to the contemporaneous construction of legislation by officials charged with the duty of administering it. See e.g., Norwegian Nitrogen Products v. United States, 288 U.S. 294, 315; United States v. Leslie Salt Co., 350 U.S. 383, 396. The Government's attempt to avoid the effect of the NLRB's contemporaneous construction in Giant Food Shopping Center by reliance on the repeal of § 9(e)(1) is wholly specious.

[4] As this Court has said in discussing the balance struck by Congress with respect to union security arrangements, "it is the entire Act, and not merely one portion of it, which embodies 'the definite statement of the national policy.'" Machinists Union v. Labor Board, 362 U.S. 411, 417, n.7.

Federal Tort Claims Act, 28 USC §1346(b), which adopts as the basis for tort liability the "law of the place [i.e., State] where the act or omission occurred." When a federal court applies State law in a suit against the United States, is it enforcing *State* policy?

We need go no farther than §301 of the Taft-Hartley Act for another example. "[State] law, if compatible with the purpose of §301 may be resorted to in order to find the rule that will best effectuate federal policy. • • • Any State law applied, however, will be absorbed as federal law and will not be an independent source of rights." *Textile Workers* v. *Lincoln Mills*, 353 U.S. 448, 457. See also *Board of Commissioners of Jackson County* v. *United States*, 308 U.S. 343, where this Court in fashioning a federal rule looked to State law.

Nor is it incongruous for the Labor Board to interpret State law in determining whether an unfair labor practice has been committed, for the Government's own theory assumes Board interpretation of "right-to-work" laws in §8(b)(3) cases (Govt. Br. 39). Federal courts constantly interpret State law. *Cf. Erie Railroad Co.* v. *Tompkins*, 304 U.S. 64.

In *Giant Food Shopping Center, supra*, the Board refused to conduct a "union shop authorization election" under former §9(e)(1) in Virginia because of that State's "right-to-work" law. Since the right to enter into a union security contract then depended on the Board's first conducting an authorization election, the Board's refusal to conduct an election incorporated that State policy into the federal law of elections and union security agreements. The Government's explanation of this case is that the intervening repeal of §9(e)(1) removed it as a precedent and that the decision was based on policy rather than statutory interpretation (Govt. Br. 50-52). These distinctions are illusory.

The repeal of §9(e)(1) self-evidently has nothing to do with §14(b)'s integration into the rest of the Act. The decision was based on statutory command, not mere policy, for the Board feared that conducting an election in Virginia might require the Board to accept an agreement negotiated thereunder as "a defense to (a) . . . complaint alleging discriminatory discharges." (See Govt. Br. 51.)

The Government's second argument for avoiding the plain meaning of the statute is that Congress did not intend to put "federal sanctions behind State laws," for such a policy would have "attracted some comment" (Govt. Br. 53). Like its previous contention, this one, too, begs the question of whether Congress meant to do what it did and to say what it said in §§7, 8(a)(3) and 14(b). Apparently the Government is contending that explicit articulation of its awareness of a specific problem is a prerequisite to finding that Congress meant what it said. This is a novel principle of statutory interpretation. If this principle is sound, however, one may ask why the anomalous scheme of remedies which the Government attributes to Congress did not "attract some comment."

Third, the Government contends that there is "compelling evidence" that Congress intended to leave the States free to enforce their own laws (Govt. Br. 55). This is a bold characterization of weak evidence. The reality is that there is no evidence that Congress did not intend to treat §14(b) as a condition of §§8(a)(3) and 8(b)(2), and the language of these sections is the strongest evidence that Congress did.

The Government would draw meaning from Congress' choice of §8(a)(3) of the Senate bill, rather than §8(d)(4) of the House bill. The short answer is that the "House Conference Committee report explains the choice on other grounds" (Govt. Br. 55). Compare the Government's rejection of a similar inference at Govt. Br. 22-23.

Since the Government concedes that the language of the Act "will bear the construction" that it is a federal unfair practice to execute a contract in violation of a valid State law enacted under §14(b) (Govt. Br. 48) and that "the Board has never passed upon the question in a contested case" (Govt. Br. 52), executing such a contract is at the least *"arguably"* an unfair labor practice, requiring the States to "defer to the exclusive competence of the National Labor Relations Board." *San Diego Bldg. Trades Council v. Garmon*, 359 U.S. 236, at 245.

We will not here repeat our affirmative argument of the relationship between §§8(a)(3), 14(b) and 7 (Pet. Br. 4-9), except to observe that the Government's brief seems unreasonably committed to avoiding the plain meaning of plain words.

III. The Legislative History Does Not Show that Congress Intended to Authorize the States to Interfere With or Supplement Federal Power to Remedy Unfair Labor Practices in this Area.

Taking the legislative history in the light most favorable to the Government, it is inconclusive. Mere bits and pieces of legislative history are cited in the Government's brief with great emphasis, even when they are no more than casually related to the subject. For example, one part of the legislative history on which the Government relies is an exchange between Congressmen Kersten and Hartley (Govt. Br. 25, 26). The Government says that this exchange has "*apparent* reference to Section 14(b)" (Govt. Br. 25; emphasis added). The exchange between these two Congressmen, edited and then quoted in the Government's brief, is as follows (1 Leg. Hist. of LMRA 883):

MR. HARTLEY: I yield.

MR. KERSTEN of Wisconsin. I wish to compliment the gentleman on the very fine exposition he is making of the conference report. I would like to ask the gentleman about that portion which pertains to the validity of State laws. Wisconsin and other States have their own labor relations laws. We are very anxious that disputes be settled at the State level insofar as it is possible. Can the gentleman give us assurance on that proposition, so that it is a matter of record that that is the sense of the language and of the report?

MR. HARTLEY. That is the sense of the language of the bill and of the report. That is my interpretation of the bill, that this will not interfere with the State of Wisconsin in the administration of its own laws. In other words, this will not interfere with the validity of the laws within that State.

MR. KERSTEN of Wisconsin. And it will permit as many of these disputes to be settled at the State level as possible?

MR. HARTLEY. Exactly.

When the whole exchange is considered, it is far from "apparent" that either man was referring to § 14(b); it is unlikely that they were even talking about the same thing. Since Congressman Kersten asked about permitting "as many of these disputes to be settled at the State level as possible," his concern was plainly not limited to the administration of Wisconsin's laws regulating union security arrangements, but was addressed to preserving generally the jurisdiction of the Wisconsin Employment Relations Board. Since Wisconsin was not even one of the "12 states [which] had enacted statutes or constitutional prohibitions

outlawing or restricting the closed shop" (Govt. Br. 18-19)[5] which §14(b) was designed to protect, there is strong evidence this colloquy did not involve §14(b) at all. In any event, Congressman Hartley's prophecy has not guided this Court's interpretations of State court jurisdiction under the Act. See, e.g., *LaCrosse Telephone Co.* v. *Wisconsin Board*, 336 U.S. 18; *Plankington Packing Co.* v. *Wisconsin Board*, 338 U.S. 953; *Plumbers Union* v. *County of Door*, 359 U.S. 354; *cf. San Diego Bldg. Trades Council* v. *Garmon*, 359 U.S. 236.

The statement made by Congressman Hartley just a few seconds before he was interrupted by Kersten dealt with the subject of "State laws," but assuredly it had no reference to §14(b) (1 Leg. Hist. of LMRA 883):

> This bill once again protects the validity of State laws on labor. Here is how we do it. This bill provides an addition to the present board of two members. In other words, it creates a board of five members.

On the basis of such unrelated scraps of history, the Government boldly asserts that the legislative history "shows beyond peradventure that Congress intended to leave the States free to exercise full concurrent jurisdiction over union security agreements" (Govt. Br. 4). Since there is not a single sentence in the legislative history which shows any Congressional awareness of this specific problem, it is unrewarding to search for Congressional opinion of a matter which was not considered. As Mr. Cox himself has admonished on this subject (Cox, Federalism in the law of Labor Relations, 67 Harv. L. Rev. 1297, at 1348):

> [It] is folly to search for straws in the statute or legislative history supposed to point to what went on in the mind of an imaginary average Congressman deliberat-

[5] See State Laws Regulating Union-Security Contracts, 21 LRRM 66, cited at Govt. Br. 19, n. 11.

> ing on a question that no one actually considered. Problems of federalism ought to be decided upon explicit consideration of the factors entering into a determination of policy, viewed from the standpoint of one sympathetic to the national labor policy embodied in existing legislation. The practice would not only lead to sounder solutions, but it would also encourage discussion helpful to the Court in future decisions and leading to a more informed body of opinion upon legislative review.

The Government's brief places some reliance on various statements in the legislative history to the effect that § 14(b) of the Taft-Hartley Act was not intended to change the pre-1947 federal policy with respect to State power. (See, *e.g.*, Govt. Br. 24, 26). This argument proves too much. The preemption doctrine depends on Congress' having occupied a field and upon the danger of conflicts in substance and procedure between federal and State authorities. The Taft-Hartley Act, unlike the Wagner Act, extensively regulated union activities for the first time. It was Congress' comprehensive regulation in the Taft-Hartley Act which vastly expanded the federal regulatory field necessitating broad preemption.

But however broadly or narrowly one reads the legislative history of § 14(b), it is impossible to find any support in it for the sharp and arbitrary line which the Government would draw between State and federal power in this case. What specific legislative history supports the Government's view that the States have "no jurisdiction over peaceful strikes and picketing under any circumstances" (Govt. Br. 6, 12, 33, 34, 36, 37, 38), but that the States have power to "enjoin or punish the execution of a union security agreement and award damages to any person injured

thereby" (Govt. Br. 32-38)?[6] What legislative history supports the Government's view that during a strike a State might enjoin an employer from executing a union shop contract, but might not "prevent the union from using economic pressure" of the strike to compel agreement on such a contract" (Govt. Br. 39)? There is none, of course.

The development of the law of preemption of interstate labor relations since 1947 makes it an exercise in fantasy to look back to the legislative deliberations then, innocent of all that has happened in the interim. "The issue was scarcely perceived until 1947 and has only become acute since 1950."[7] Our opening brief summarizes the holdings of some 20 leading cases of this Court which have held State power, remedial as well as substantive, to be preempted by the federal Act to avoid a conflict. These cases are part of the administrative flesh and blood of the Act, and it is senseless to look at this as though those cases had never been decided and as though this were 1947.[8]

While the 1947 Congress was aware that some 12 States then had enacted "right-to-work" laws, there is not one word in the entire legislative history to show any Congressional awareness that these statutes provided criminal sanctions or other kinds of remedies. To suppose that Con-

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[6] The Government's brief itself correctly notes that prior to 1947 the States "were applying their own laws to strikes and picketing, and there was little, if any, thought given to the possibility that the enactment of Section 8(b) might occupy the field" (Govt. Br. 28).

[7] Cox, Federalism in the Law of Labor Relations, 67 Harv. L. Rev. 1297, at 1347.

[8] For this reason, little attention need be given to "contemporary commentators" who in 1947 and 1948 were barely able to do more than paraphrase Congress' own words, since the Act had not received any authoritative interpretation. (See Govt. Br. 31.)

gress, nevertheless, was aware of such State remedies and intended such remedies to be applicable, even where the N.L.R.B. might independently provide a remedy under §§ 8(a)(3) and 8(b)(2) to the identical conduct, requires a series of improbable and speculative inferences. Unless one views this case as a jig saw puzzle, and attempts to fit odd pieces of the 1947 legislative history into the 1963 mold, whether or not they fit, the legislative history does not greatly aid the resolution of this case.

Finally, although we will not here restate the arguments of our opening brief that the substitution of present § 14(b) for the language of § 13 of H.R. 3070 is a deliberate deletion of State remedial power in this area, the Government's brief attempts to evade the argument by speculating that Congress simply preferred the "more concise" language of §14(b) (Govt. Br. 22). The reality of the change is more important, we believe, than the Government's speculation.

IV. Whether Or Not Violation of A "Right-To-Work" Law Per Se Violates §8(a)(3), the Danger of Substantive Conflict With the Federal Act Requires That the Federal Board's Jurisdiction Be Exclusive.

The exclusive primary jurisdiction of the Board to enforce State prohibitions against union shop agreements in interstate commerce is necessary to avoid substantial conflicts in the interpretation of the national Act.

Though leaving open the question whether the § 8(a)(3) proviso and § 14 (b) are "perfectly coincident" (373 U.S. at 751); the Court's opinion in this case made quite clear that § 14(b) comes into play only with respect to activities which would be unfair labor practices but for the § 8(a)(3) proviso. That is what the Court *said*, 373 U.S. at 751 and 756, and what it *did*, since it looked to its interpretation of

the proviso in *General Motors* (373 U.S. 734) as controlling on the validity of the agency shop herein, 373 U.S. at 751 and 755. Thus, implicit in any application of § 14(b) is an interpretation of the § 8(a)(3) proviso. Once this is recognized, the exclusivity of Board jurisdiction follows inescapably from *San Diego Bldg. Trades* v. *Garmon*, 359 U.S. 236, for the interpretation of the first proviso of § 8(a)(3) is grist for the Board's mills. See, e.g., *American Seating Co.*, 98 NLRB 800, cited with approval in *Labor Board* v. *General Motors*, 373 U.S. at 742.[9]

If, in the guise of exercising power under § 14(b), the States were to interpret the § 8(a)(3) proviso for themselves, they might regulate conduct which is not protected by that proviso and, thus, remedy an unfair labor practice. That States may not do this was settled even before *Garner* by *Plankington Packing Co.* v. *Wisconsin Board*, 338 U.S. 953. On the other hand, since the States' power under § 14(b) extends only to making rules with respect to discrimination for union non-membership,[10] the States might err in the opposite direction and proscribe conduct which is lawful under the federal Act but not left to the States by § 14(b). Compare *Teamsters Union* v. *Labor Board*, 365 U.S. 667 (union exclusive hiring hall not per se illegal under federal law), with *Kaiser* v. *Price-Fewell, Inc.*, 235 Ark. 295, 359 S.W. 2d 449, cert. denied 371 U.S. 955 (union exclusive

[9] The meaning of the § 8(a)(3) proviso often involves close and delicate questions, as for example in the dues tender cases which perennially trouble the Board. See, e.g., Aluminum Workers, 112 N.L.R.B. 619, enforced 230 F. 2d 515 (CA 7), but disapproved in IAM v. Labor Board, 247 F. 2d 414 (CA 2), and N.L.R.B. v. Technicolor Motion Picture Corp., 238 F. 2d 348 (CA 9). Aluminum Workers was substantially overruled in General Motors Corp., 134 N.L.R.B. 1107. See also Philadelphia Sheraton Corp., 136 N.L.R.B. 888, 895-97; Colgate Palmolive Co., 138 N.L.R.B. 1037, 1038-39.

[10] In other words the exercise of jurisdiction under § 14(b) assumes an interpretation of § 8(a)(3) itself as well as of the union shop proviso.

hiring hall illegal under state law). See also the examples cited in Pet. Br. 18.

For these reasons, this Court's delineation in its earlier opinion of the relationship between the § 8(a)(3) proviso and § 14(b) is dispositive of the question. The failure of the Government and the State Attorneys General even to advert to this discussion is a telling admission, for what this Court has already said in this case would seem a necessary point of departure for any argument, whatever its ultimate destination. But what the Government *does* say likewise requires the conclusion that the applicability of § 14(b) turns on a determination which is committed exclusively to the Board. The Government acknowledges that if a union "were to execute a union-shop contract even though it had not been designated as the bargaining representative, the national Board would have jurisdiction to deal with its activities as violations of § 8(b)(2), for its conduct would not meet the conditions expressly stated in the proviso to Section 8(a)(3) (Govt. Br. 43). The precise language of the proviso referred to here is "if such labor organization is the representative of the employees as provided in Section 9(a), in the appropriate collective-bargaining unit covered by such agreement when made. . . ."

Whether a union is such "representative" is a determination committed exclusively to the Board, as Congress well knew in enacting § 8(a)(3), since this Court had so held in the *Bethlehem Steel* case,[11] which Congress had very much in mind in delineating State and federal authority. See *Amalgamated Association* v. *Wisconsin Board,* 340 U.S. 383, 397-398. Thus, even under the Government's theory, a State's determination that it has jurisdiction, because a union has executed a union-security contract, assumes that

[11] Bethlehem Steel Co. v. New York State Labor Relations Board, 330 U.S. 767. The treatment of this case at Govt. Br. 4, n. 3, is incomprehensible.

the union is the § 9(a) representative, although the Board might hold otherwise, with the result that this conduct would be an unfair labor practice and outside § 14(b).

The avoidance of such substantive conflicts was one of the reasons that Congress entrusted the Board with exclusive primary jurisdiction in the administration of Title I of the Act. We cannot accept the Government's contention that the possibility of such conflict is of concern only, or mainly, where the union is engaged in strikes or picketing (Govt. Br. 32-42). On the same day that reargument was ordered herein, the Court in two cases applied *Garmon* to non-strike situations, *Plumbers' Union* v. *Borden*, 373 U.S. 690; *Iron Workers* v. *Perko*, 373 U.S. 701. In the *Plumbers'* case, the Court expressly observed that the exercise of state jurisdiction might result in the sacrifice of § 7 rights. 373 U.S. at 695. Thus the tortured effort to limit the authority of *Curry and Farnsworth* to picketing cases (Govt. Br. 33-39) avails naught.[12] There is, as we have remarked before, no distine-

[12] The suggestion (Govt. Br. 38, n. 25) that the Curry and Farnsworth decisions were made on inadequate consideration and are therefore not authoritative precedents merits but brief comment. First, we have never understood the stare decisis effect of this Court's statutory interpretations to depend on the quality of the briefs. Second, respondent's brief in Curry devoted an entire section to preemption (Br. for Respondent, No. 87, Oct. Term 1962, pp. 16-26). Respondent relied specifically on § 14(b), on the Algoma decision and, most significantly, on the same language in the House Conference Report which is the Government's main reliance here (see Govt. Br. 23). In reply petitioner distinguished Algoma and expressly relied on Farnsworth & Chambers (see Reply Br. for Petitioners, No. 87, Oct. Term, 1962, pp. 2-4).

Contrary to the Government's view, we think the Court's opinion in Curry devoted the discussion to the § 14(b) issue which it required, for the question had already been decided in Farnsworth & Chambers. In the latter case, one of the "Questions Presented" had been whether § 14(b) preserved to the States jurisdiction over picketing which was protected or prohibited under the Act; respondent had relied heavily on Algoma (see petition for certiorari and brief in opposition pp. 3-5, No. 891, Oct. Term, 1957).

tion in the statute, in the legislative history, or in principle as to the need for Board exclusivity with regard to strikes and picketing on the one hand and the execution or administration of collective agreement on the other.

Nor is there any need to reconcile *Curry* and *Farnsworth* with *Algoma Plywood Co.* v. *Wisconsin Board*, 336 U.S. 301, for that case was superseded as to State jurisdiction by *Garmon*. In *Algoma* the Court wrote: "Where the State and federal laws do not overlap, no cession is necessary because the State's jurisdiction is unimpaired." 336 U.S. at 313. One week earlier, the Court had said "There is no existing or possible conflict or overlapping between the authority of the Federal and State Boards, because the Federal Board has no authority either to investigate, approve or forbid the union conduct in question." *Auto Workers* v. *Wisconsin Board*, 336 U.S. 245, 254. In both opinions the Court examined whether the activity was either protected or prohibited by federal law, and, concluding that it was not, sustained State jurisdiction. But *Garmon* rejected the view that the Board's exclusive primary jurisdiction was limited to situations in which this Court has found an "overlap"; it is sufficient that the subject matter be "arguably" protected by § 7 or prohibited by § 8, and this Court will not determine for itself whether § 7 or 8 actually applies. In so holding, the Court expressly overruled the *Auto Workers* case, *supra*, see 359 U.S. 245, 4, as was again remarked in *Labor Board* v. *Insurance Agents*, 361 U.S. 477, 493, n. 23. When *Auto Workers* fell, its companion [13] *Algoma* came tumbling after.[14]

The circumstance that *Algoma* involved § 14(b) cannot save it, for the sole context in which § 14(b) was there con-

[13] The cases were argued in succession (see U.S. Sup. Ct. Journal, Nov. 18, 1948) and were undoubtedly considered together.

[14] While their view cannot be controlling it is noteworthy that the dissenters from the Garmon holding believed that the majority had overruled Algoma. See 359 U.S. at 253.

sidered was in determining whether the agreement was protected by federal law, and thus excluded from State jurisdiction by virtue or the "overlap" theory. Indeed, at the time of *Algoma* the question now before the Court would have been meaningless. For until it was fully appreciated that the exclusive jurisdiction of the Board has purposes other than the avoidance of substantive conflict, the method of the *Auto Workers* and *Algoma* cases was reasonable and satisfactory. But beginning with *Garner*, 346 U.S. 485, 490-91 (quoted at Pet. Br. 15), the Court took a broader view. As was said in *Garmon*, 359 U.S. 236 at 243, "We have been concerned with conflict in its broadest sense, conflict with a complex and interrelated *federal scheme of law, remedy, and administration.*" Yet the Government asserts that "the exclusivity of the jurisdiction of the National Labor Relations Board, including the exclusivity of its remedial powers, rests upon the need for ensuring that the substantive rules laid down by Congress are given uniform application (Govt. Br. 42, 43). When *Algoma* was decided this narrow view would have been acceptable; today, after *Garner* and *Garmon*, it is startling.

Thus, even if the Court does not determine independently that the violation of State laws authorized by § 14(b) constitutes an unfair labor practice, the avoidance of conflict in the interpretation of the Act requires that Board jurisdiction be exclusive. In the next section we show that the result is required also if a serious conflict of remedies is to be avoided.

V. The Government's Arbitrary Line for Separating Federal and State Power Is So Tenuous and Anomalous That It Would Be the Source of Great Mischief and Confusion As a Matter of Remedies.

The Government's position that § 14(b) grants the States power to prevent, remedy and punish the "actual execution" of a union security agreement and its application,

but no power over peaceful "conduct" tending to violate a State "right-to-work" law (Govt. Br. 32-39), is academically contrived and arbitrary. It is not supported by the legislative history, and it rubs hard against the grain of the preemption doctrine. Indeed, nowhere does the Government explain why it comports with Congress' intention to preempt the States of any regulatory power over strikes and picketing to achieve contracts which would violate State laws. Presumably the Government feels bound by this Court's picketing cases involving "right-to-work" States, although it may not regard them as well considered (Govt. Br. 37-38, n. 25).

Serious and irreconcilable anomalies inhere in the Government's scheme. Although the Government gracelessly charges that it is "Congress' anomalous decision to allow State intrusion into an area as close to the heart of labor-management relations as union security" (Govt. Br. 32) which is the source of the Government's analytical problems, it seems more likely that the Government has created anomalies in Congress' name which Congress would have thought to be intolerable.

A closed shop agreement is a violation of §§ 8(a)(1) and (3), and 8(b)(1)(a) and (2) in *any* State. A union shop, however, under the Government's view would be lawful in every State, including "right-to-work" States. If States have power to remedy the execution of contracts in violation of their "right-to-work" laws, one would only commit an unfair labor practice by executing a closed shop agreement in Georgia (because the State would be preempted of regulatory power by virtue of the plain unfair labor practice), whereas one would commit a crime and could be imprisoned for executing a union shop agreement in that same State.

Another anomaly in the Government's position is this. Suppose a *minority* union enters into a union security con-

tract in a "right-to-work" State. Undoubtedly, as the Government concedes (Govt. Br. 39) executing such a contract with a minority union would constitute an unfair labor practice in any State under §§ 8(a)(1) and (3), and 8(b)(1)(A) and 8(b)(2). But, if it is a *majority* union which enters into the union security contract in a "right-to-work" State, there would be no federal unfair practice under the Government's view, and the State courts could uninhibitedly remedy the State law violation. This egregious result surely could not have been intended.

A grave practical weakness under the Government's proposal is that "a State might enjoin an employer from executing a union shop contract yet be powerless to prevent the union from using economic pressure to compel him to violate the decree or to pressure him for complying with the statue" (Govt. Br. 39). Although the Government suggests that this anomaly is more apparent than real, the contrary is the case. Indeed, according to the Government, a State court would have no power to enjoin a strike which includes among its objects violation of a "right-to-work" law, but it would have power—during the strike—to enjoin the employer and the union from entering into the very contract which the union seeks by its unenjoinable strike to compel the employer to execute. It is inconceivable that State court judges will respect the nicety of any such line once it is conceded that they have power to enjoin parties from entering into such a contract and to punish or redress the parties for actually applying such contract.

Although conceding that there "would be serious danger of interference with national policy if a State tribunal were permitted to interfere with the course of bargaining between an employer and the representative of his employees" (Govt. Br. 40), the Government is willing to let the State courts enjoin the execution of a particular contract, in advance of any agreement on its terms (Govt. Br. 32).

Conceding that its scheme would necessarily interfere with the national labor policy, the Government argues, it "will not greatly interfere" (Govt. Br. 28) or "unduly" (Govt. Br. 44). This is a novel and unprecedented approach to pre-emption. See Cox, Federalism in the Law of Labor Relations, 67 Harv. L. Rev. 1297, 1317. Compare *Guss* v. *Utah Board*, 353 U.S. 1.

The confusion which the Government's proposal would generate might take many years and a series of cases before this Court to clarify. Even the theoretical expression of the Government's proposed policy is difficult to understand, and its actual application will be many times more difficult. The dual Congressional objectives of preserving the integrity of federal law and procedures while permitting the States to prohibit compulsory membership agreements can best be fulfilled by exclusive administration of §§ 7, 8(a)(3) and 14(b) by the federal Board, taking State law into account.

Our opening brief discusses the severity of remedies provided by the State "right-to-work" laws (Pet. Br. 11-12). These remedies are totally incongruous with remedies provided by the federal Act, and there is no reason to think that Congress would have intended to authorize the States to apply such extremely diverse and punitive remedies. The Government's response to this argument is that there is no federal policy in favor of cease and desist orders (Govt. Br. 44). There obviously *is* a federal policy in favor of cease and desist orders to remedy unfair labor practices, for the purpose of the Act is remedial, not punitive. *Republic Steel Corp.* v. *Labor Board*, 311 U.S. 7, 10-12. Since § 14(b) is inextricably interwoven with the rest of the Act, the remedies applied thereunder must harmonize with remedies provided under other sections of the Act. See also *Phelps Dodge Corp.* v. *Labor Board*, 313 U.S. 177, 193-195.

Since the enactment of the Norris-LaGuardia Act in 1933, 47 Stat. 70, 29 USC § 101 *et seq.*, Congress has repeatedly expressed concern over the application of remedies to labor relations in interstate commerce. Sections 10(c), (j), and (l) reflect Congress' concern in the Taft-Hartley Act itself that the remedies employed by the Board and the federal courts be carefully tailored to their immediate purpose. When Congress intended to authorize private parties to bring actions for violations of the federal Act, it did so quite explicitly, as in § 302(e). When Congress intended to permit private suits in States courts to remedy violations of federally created rights, it similarly did so very explicitly, as in § 303(b). See *Bakery Drivers* v. *Wagshal*, 338 U.S. 437. Under Section 10(a) the N.L.R.B. may not even cede jurisdiction to the States unless the State laws are consistent in all respects—including, quite importantly, remedies.

As recently as in *Sinclair Refining Co.* v. *Atkinson*, 370 U.S. 195, the Court reviewed the entire subject of remedies applicable to labor disputes in interstate commerce, concluding that Congress does not lightly confer remedial power on any courts in this volatile field. Does it make sense to suppose that a Congress which has always been extremely sensitive to remedies would, without ever saying so, give the States carte blanche power to remedy the execution or application of a union security contract in commerce? Would such a Congress give the State courts unqualified power to imprison, fine, enjoin and grant various kinds of damages against parties in commerce merely for executing an agency shop contract (valid everywhere under federal law), while making execution of a closed shop contract by the same parties in the same State an unfair labor practice remediable only by the N.L.R.B.? The Government's view would compel the conclusion that Congress, knowingly but silently, intended foolish and incongruous results under § 14(b).

CONCLUSION

For the foregoing reasons the judgment of the court below should be reversed.[15]

Respectfully submitted,

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[15] The complaint in the instant case asks an injunction against "a strike or lockout of the employees as a means of enforcing" the agency shop clause in question (R. 6). Although it notes this problem, the Government does not suggest that this is beyond State power; instead, the Government argues that the "heart of the relief" sought here does not involve a strike (Govt. Br. 36-37).

We cannot reconcile the Government's proposal for the disposition of all other cases with its proposal for dealing with the instant case. How can the Government expect others to understand and to apply fairly a rule which the Government itself ignores at the earliest possible opportunity?